Supreme Court, U.S.
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No. 97-1781

In The

Supreme Court of the United States

October Term, 1997

JESSICA L. HAYDEN, NICOLE C. MERRILL and COLLEEN M. RHOADS,

Petitioners,

vs.

RICHARD GRAYSON, CHIEF OF POLICE OF THE TOWN OF LISBON, N.H.

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the First Circuit err in holding that proof of discriminatory motive is needed to sustain an equal protection claim?

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STATEMENT OF THE CASE

In 1983, the petitioners told respondent Richard Grayson, Chief of Police of the Town of Lisbon, New Hampshire, that they had been sexually assaulted by Hervey Gagnon (stepfather of two of the petitioners and natural father of the third). Chief Grayson later told them that the county attorney would not prosecute the case. In 1990 the petitioners raised their complaint again. The county attorney was contacted; Gagnon was prosecuted and sentenced to a term in prison. All other facts are disputed.[1] Specifically, Grayson denies that he was negligent toward the petitioners, that he lied to the petitioners, and that he had a policy of nonintervention in domestic sexual assault cases.

The United States District Court for the District of New Hampshire granted Grayson summary judgment as to the petitioners' Section 1983 equal protection claim, based on a finding that they had not established a discriminatory motive on the part of Grayson. The First Circuit Court of Appeals affirmed.

The petitioners have incorrectly framed the question presented to this Court for review. Their phrasing includes at least three unwarranted assumptions: (1) that a discriminatory policy existed; (2) that punishment of a criminal within a given time period is the same as "protection" of the victim;[2] and (3) that the issue is whether a hypothetical policy would be

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1. Among the disputed facts are the statements of the petitioners' mother that she did not want Gagnon prosecuted.

2. At pages 3-4 of their petition, the petitioners misstate the sequence of pertinent events. Gagnon's sexual assaults had ended long before the petitioners and their mother made statements to Grayson in October and November of 1983. Even the incident with the telephone (Petition, p. 4) occurred four months *before* they met with Grayson.

prohibited by the Equal Protection Clause, rather than whether the petitioners were injured by operation of such a policy.

An accurate statement of the question at issue would be:

> *Did the First Circuit err in holding that proof of discriminatory motive is needed to sustain an equal protection claim?*

A petition for writ of certiorari will be granted only for compelling reasons. Supreme Court Rule 10. The petitioners are incorrect when they contend that the First Circuit's decision conflicts with prior decisions of this Court, or that circuit courts disagree, or that an important issue of federal law remains unsettled. The decision from the Court of Appeals is consistent with precedent from this Court and other circuits, and the question of whether a plaintiff must show discriminatory intent in an equal protection claim has been resolved without ambiguity.

REASONS FOR DENYING THE WRIT

I.

THE FIRST CIRCUIT CORRECTLY RULED THAT PROOF OF DISCRIMINATORY MOTIVE IS NEEDED TO SUSTAIN AN EQUAL PROTECTION CLAIM.

The gist of the petitioners' argument is that a showing of discriminatory intent is unnecessary where a plaintiff alleges the existence of a policy which facially discriminates against victims of a particular crime.[3] Their view is not supported by the decisions of the federal courts.

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3. The distinction between facially discriminatory and facially neutral policies was not raised in the petitioners' First Circuit brief or argued orally below.

As the Tenth Circuit has stated succinctly:

> to survive summary judgment, the plaintiff must go beyond her pleadings and show that she has evidence of specific facts that demonstrate that it is the policy or custom of the defendants to provide less police protection to victims of domestic assault than to other assault victims. She must also provide evidence that discrimination was a motivating factor for the defendants and that she was injured by operation of the policy or custom.

Watson v. City of Kansas City, Kan., 857 F.2d 690, 694 (10th Cir. 1988).

A showing of disproportionate impact alone is not enough to establish a constitutional violation. *See Washington v. Davis*, 426 U.S. 229, 242 (1976). A plaintiff seeking to prove an equal protection violation must show that the relevant policy-makers and actors were motivated, at least in part, by a discriminatory purpose. *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265 (1977); *Personnel Administrator v. Feeney*, 442 U.S. 256, 274 (1979). This Court has defined discriminatory purpose as:

> more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker . . . selected or reaffirmed a course of action at least in part "because of," not merely "in spite of" its adverse effects upon an identifiable group.

442 U.S. at 279. The First Circuit followed this reasoning in *Soto v. Flores*, 103 F.3d 1056, 1067 (1st Cir. 1997), and followed *Soto* in the present case.

The cases cited by the petitioners simply confirm this principle. *See Wayte v. United States*, 470 U.S. 598, 608-9 (1985). This is true even in the Ninth Circuit, where petitioners claim the law is different. In *Navarro v. Block*, 72 F.3d 712 (9th Cir. 1995), for example, the court found that "a long line of Supreme Court cases make clear that the Equal Protection Clause requires proof of discriminatory *intent* or *motive*." 72 F.3d at 716 (emphasis in original).

Some courts have allowed equal protection claims to go forward where there is *uncontradicted evidence* of a policy of police nonintervention in domestic assault cases. *Navarro v. Block*, 72 F.3d 712 (9th Cir. 1995); *Smith v. City of Elyria*, 857 F. Supp. 1203 (N.D. Ohio 1994); *Cellini v. City of Sterling Heights*, 856 F. Supp. 1215 (E.D. Mich. 1994). The common thread of these cases is a factual finding that the evidence supported the plaintiffs' claim that the defendants discriminated against them *because of* their status as victims of domestic violence, and therefore may have had a discriminatory motive. In the present case, the District Court found no evidence of discriminatory motive.

II.

PETITIONERS MISCONSTRUE THE MEANING OF A "FACIALLY" DISCRIMINATORY POLICY.

The petitioners maintain, in essence, that any policy which draws a distinction between classes of citizens is facially discriminatory, and that in such cases no proof of intent is needed. The only exception, they assert, is where a plaintiff claims discrimination based on a protected status such as race or gender, in which case the plaintiff must establish discriminatory intent. This position is both illogical and contrary to precedent.

There is an old line of cases supporting the proposition that some laws are so obviously based on a discriminatory motive (*i.e.*, a desire to harm) that further evidence of the lawmaker's intent is not needed. In *Strauder v. West Virginia*, 100 U.S. 303 (1880), the Court found that the obvious purpose of a statute prohibiting blacks from serving on juries was to create a disadvantage for black defendants, and ruled the statute unconstitutional on its face.

In *Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920), the Court held that a tax statute (the existence and terms of which were not in dispute) violated the Equal Protection Clause by exempting certain corporations according to an "illusory" classification. Justices Brandeis and Holmes dissented, noting that the Fourteenth Amendment

> forbids merely inequality which is the result of clearly arbitrary action and, particularly, *of action attributable to hostile discrimination against particular persons or classes.*

253 U.S. at 417-18 (emphasis added). It is that line of reasoning which this Court has followed.

It is not a foregone conclusion that a policy of police nonintervention in domestic assault cases must be based on a desire to harm victims of such assaults. What the petitioners interpret as the First Circuit volunteering a rational basis for differentiating between types of crimes is actually analysis of whether a desire to harm victims is the only plausible explanation for the alleged policy.

It is not. There was no evidence that Grayson held a secret grudge against domestic assault victims. In fact, the petitioners themselves provided a variety of other motivations for Grayson's alleged actions.

III.

THE PETITIONERS FAILED TO ESTABLISH THAT GRAYSON HAD A DISCRIMINATORY POLICY OR A DISCRIMINATORY MOTIVE.

The petitioners allege that Chief Grayson failed to act on their complaint because they were minors and/or females and/or victims of domestic assault. As the District Court noted, this scattershot approach demonstrates that they have no idea what motivated Grayson. Summary Judgment Order, Petition, App. E at 24a. In the present petition they abandon the claims based on gender and age.

Twice, the petitioners aver that the District Court "stated" and "recognized" that they had "produced enough evidence to raise a reasonable inference that the defendant had a custom [of discriminating against certain victims]." Petition, pp. 5, 6-7. Surprisingly, they neglect to quote the first few words of the Court's sentence: "The court *assumes for the purposes of this motion* that the plaintiffs have produced enough evidence . . . ." Summary Judgment Order, Petition, App. E at 25a, n.5 (emphasis added).

In fact, the petitioners produced virtually no evidence that Grayson had a custom or a policy of providing less protection to child victims of domestic sexual abuse than to the victims of other similar crimes.[4] Such evidence as they did produce suggested a host of alternative explanations for Grayson's alleged conduct. *See* Summary Judgment Order, Petition, App. E at 28a-31a. Far from finding that they had produced enough evidence to support their claim of a policy of discrimination, the District Court held that:

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4. They ignore the evidence produced by Grayson showing that he did indeed investigate and prosecute crimes committed against minors, females, and victims of domestic assault.

> No reasonable fact finder could conclude, based on this paucity of evidence, that the reason for the defendant's behavior was an intent to discriminate against the plaintiffs.

Summary Judgment Order, Petition, App. E at 31a.

IV.

THE LOWER COURTS DID NOT ERR IN DECLINING TO APPLY A RATIONAL BASIS TEST.

The petitioners wish to skip the first step of an equal protection analysis — discriminatory motive — and proceed directly to a rational basis analysis, even though Grayson denies he had a nonintervention policy. The petitioners assert that Grayson's "failure to articulate a rational basis for the policy should have been fatal to his summary judgment motion." Petition, pp. 7-8. By this unusual logic, summary judgment may never be granted so long as a plaintiff alleges a discriminatory policy and the defendant denies its existence. Both the District Court and the First Circuit correctly declined to make a rational basis determination, ruling instead on the dispositive threshold issue of discriminatory motive.

CONCLUSION

For the reasons stated above, the writ of certiorari should be denied.

Respectfully submitted,

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